IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION(BAIL) NO.321 OF 2006

Mr. Eduard Schrabeck,
Austrian National
presently in Judicial Lockup,
Mapusa Goa. ... Applicant

versus

The State
(Through Anti Narcotics Cell,
Police Headquarters, Panaji,
Goa). ... Respondent

Mr. Anthony D'Silva, Advocate for the Applicant.

Mr. C. A. Ferreira, Public Prosecutor for the State/Respondent.

CORAM : N. A. BRITTO, J.

DATE : 21ST SEPTEMBER, 2006.

ORAL ORDER

Heard Mr. Anthony D'Silva, the learned Counsel on behalf of the applicant/accused and Mr. C. A. Ferreira, the learned Public Prosecutor on behalf of the respondent.

2. The applicant herein is an accused who is being prosecuted before the N.D.P.S. Court at Mapusa with the allegation that on 9-3-2006 he was found in possession of 4.362 kgs. of charas near Our Lady of Mount Carmel High School at Arambol, Goa under Section 20(b)(ii)(C) of the N. D. P. S. Act, 1985.

3. The applicant approached the N. D. P. S. Court with his application for bail and the same came to be rejected by Order dated 20-7-2006 and hence the applicant is now before this Court seeking bail.

4. The grounds urged in support of the application are in relation to the complaint filed against the accused and the panchanama drawn at the time of seizure. The complaint shows that the conversation between the Search Officer and the accused who is stated to be an Austrian National, took place in English and the panchanama shows that the same was explained to the panchas in Konkani language. On the basis of the aforesaid two documents, Mr. Anthony D'Silva, the learned Counsel on behalf of the applicant submits that since the Search

Officer had prior information that he was going to search a foreigner, the least he should have done is that he should have taken panchas who were independent and knew the English language. The learned Counsel further submits that in the absence of having taken search witnesses who are independent and who knew English, it cannot be said that provisions of search and seizure, particularly those of Section 50 of the Act were complied with. To support the submission that independent witnesses were required to be taken, Mr. D'Silva has placed reliance on the judgment of this Court in the case of **B. Chandra Mohan** v. **State of Goa**(2006 (GLR)(1) 564) wherein this Court, inter alia, observed that the minimum care which was expected of a P.I. was to take independent panch witnesses to witness the search and seizure transaction, if such Officer was to act with reasonable prudence. As far as this aspect of the case is concerned there is nothing on record even to remotely suggest at this stage that the witnesses to the search and seizure panchanama are not independent. Mr. D'Silva has also placed reliance on another Division Bench Judgment of this Court in the case of **Peter Diplinger** v. **State of Goa** (1998 Bom C.R.(Cri)) Criminal Appeal No.12 of 1997 decided on 28-11-1997 wherein

this Court had occasion to observe that there was no evidence on record to say that PW6 could not secure the presence of witnesses knowing English or that panchas knowing English were not available and one of the panchas who knew little English was not produced. The said observations were made by the learned Division Bench whilst appreciating the evidence of prosecution witnesses in that case and therefore the same could not be imported and applied at this stage when there is nothing on record to positively suggest that the panch witnesses did not know English and even otherwise to contend that what is stated by the complainant himself cannot be accepted. At this stage, the Court is required to take the facts stated in complaint and the panchanama at their face value and record a prima facie conclusion whether the facts stated are sufficient to make out an offence or not. Reliance has been placed by Mr. D'Silva on the case of **Jiju Hasan** v. **Narcotic Control Bureau** (2004 CRI.L.J. 3517) wherein it was stated that only because a Public Prosecutor opposes a bail it does not mean that a Court cannot grant bail. Reliance is also placed on **Fulkumar Suratsingh Sigrahwa** v. **The State of Maharashtra**(2004 CRI.L.J.4726) wherein the Court had disbelieved the prior information on the

ground that it was stated therein that the accused would be coming, inter alia, with a tin box on his shoulder. Mr. D'Silva has also placed reliance on **Mari Appa** v. **State of M.P.**(1990 CRI.L.J.) 1990) wherein the learned Single Judge of M.P. High Court held that in case of violation of procedural safeguards as provided under the Act, the accused is entitled to bail. Reliance is also placed on the case of **Sarija Banu and another** v. **State** ((2004) 12 SCC 266) wherein bail was granted by the Apex Court in a case where there was also an allegation under Section 20(b)(ii)(C) of the Act but I must hasten to add that that case stood on its own facts and what was stated therein cannot be applied to the case at hand.

5. Section 37 of the N.D.P.S. Act, 1985 has made certain offences as non bailable and Clause (b) of sub-section (1) of Section 37 provides that no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity (which is the case at hand) shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to

oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

Sub-section(2) of Section 37 provides that the limitations on granting of bail specified in clause(b) of sub-section(1) are in addition to the limitations under the Code of Criminal Procedure, 1973(2 of 1974) or any other law for the time in force for granting bail.

6. When an application is moved for bail of an accused who is stated to have been found with commercial quantity of charas, the Court is expected to look at the bail application negatively. Section 37 of the Act starts with a non obstante Clause and unless the twin conditions (i) and (ii) of Clause (b) of sub-section (1) are satisfied there is no question of grant of bail and that is because the N.D.P.S. Act is a special enactment enacted to make stringent provisions for control and regularisation of operation relating to narcotic drugs and

psychotropic substances. The limitations imposed are in addition to the limitations on granting bail found in Code of Criminal Procedure, 1973.

7. With reference to sub-clause(b) of sub-section(1) of Section 37 of the Act the Apex Court in **Collector of Customs, New Delhi** v. **Ahmadalieva Nodira** ((2004) 3 SCC 549) (speaking through three learned Judges) has stated that the two limitations imposed are:-

(i) an opportunity to the Public Prosecutor to oppose the bail application, and (ii) satisfaction of the Court that there are reasonable grounds for disbelieving that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

8. The Apex Court has further noted that apart from the grant of opportunity to the Public Prosecutor, the other conditions which really have relevance are:-

The satisfaction of the Court that there are reasonable

grounds for disbelieving that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable cause for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the alleged offence.

9. It is not the case of the applicant that any of the provisions whether directory or mandatory of the N.D.P.S. Act have been violated by the Search Officer. The issues raised on behalf of the applicant pertain to the realm of appreciation of evidence. They are insufficient to record a satisfaction that the accused is not guilty of the offence with which he is charged. At this stage, the Court is bound to accept the complaint and other statements including the panchanama at their face value and

once so accepted it does appear that there are no reasonable grounds for believing that the accused is not guilty of the alleged offence.

10. In the light of the above, I find no merit in this application. The same is hereby dismissed.

11. Needless to observe the observations made herein are only for the purpose of disposal of the application for bail and it is expected that the Court dealing with the matter would dispose of the case when it comes for final hearing on its own merits and uninfluenced by the said observations.

N. A. BRITTO, J.

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